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IMPACT OF LEGISLATION, TAXATION, SUBSIDIES AND TARIFFS ON THE VOLTA RIVER PROJECT NEGOTIATIONS

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IMPACT OF LEGISLATION, TAXATION, SUBSIDIES AND TARIFFS ON THE VOLTA RIVER PROJECT NEGOTIATIONS

BY E.A.K. AKUOKO

The Volta River Project consists of two separate parts: a dam and hydroelectric power station together with a transmission line covering the southern part of Ghana, which will be referred to in this paper as the power project, and an aluminium smelter that will use approximately one-third of the total output of power from the station. The power project is being constructed and on completion will be operated by the Volta River Authority, a public corporation set up under the Volta River Development Act. The Smelter will be constructed and operated by the Volta Aluminium Company Limited (called Valco for short) a private company formed in Ghana by the Kaiser Aluminium and Chemical Corporation and Reynolds Metals Company, both of the United States. The company will convert alumina belonging to the shareholders only. The smelter and the power projects are interdependent in as much the power project will offer a cheap source of electricity for the smelter, and the smelter will provide a guaranteed customer for the purchase of that proportion of the power which together with the consumption of present users will defray the capital cost of the power project.

Half of the funds for building the power project is being provided by the Government of Ghana and the other half in the form of loans by the International Bank for Reconstruction and Development, two agencies of the United States Government: the Agency for International Development and the Export Import Bank of Washington, and by the Board of Trade of the United Kingdom Government. All these loans are guaranteed by the Government of Ghana. The funds for the smelter are being provided partly by the shareholders of the company

and partly by a loan made available to that company by the Export-Import Bank of Washington.

The basic document underlying the project is the Master Agreement between the Government of Ghana and the Volta Aluminium Company together with its schedules. The Agreement was submitted to the Parliament of Ghana both after it was initialled in February 1961 and just before it was executed in final form in January 1962. The Agreement is intended to bind the country and not merely the Government; and after a White Paper had been published to explain its provisions, Parliament was called upon to pass a resolution in support of its terms and those of its schedules, thereby expressing their acceptance by the whole country. The Government undertakes not to amend or modify or prevent the due and effective performance of the Agreement and its schedules by any legislative or administrative act present or future. The Agreement looks ahead in stating that in the event of Ghana entering a confederation of African states or a customs union, its force and effect will not be impaired.

The Master Agreement sets out the respective rights and obligations of the Government and the company towards each other in prosecuting the project for a period ending thirty years following the commencement of the smelter operations. It contains a provision for making or executing all instruments and taking all such steps as may be necessary including exemptions from or repeal of all present and future enactments and administrative acts for the further assurance of these rights and obligations. This and similar provisions in the loan and other agreements relating to the scheme called for no less than twenty seperate legislative and administrative acts alone by the Government of Ghana.

First of all the Volta River Development Act was required to be enacted by the Parliament of Ghana before the execution of the Master Agreement. This Act provides for the setting up of a corporation independent of the Government except in matters of basic national policy, which was to be charged with responsibility for the construction and operation of the power project. Full executive powers are vested in the Chief Executive of the Authority subject only to the

general control of the board in matters of policy. The Authority's powers include those of local government over the township built at the site of the dam and power station and the area surrounding the lake that will be formed as a result of the building of the dam.

In addition to borrowing powers generally conferred on th Authority, Ghana is obliged under the Act to provide for it in the form of investments for the first ten years of the project sums required by the Authoirty up to a maximum of thirty-years million pounds. Such investments are charged on the Consolidated Fund of Ghana, which means that they do not require further specific appropriations by Parliament. Both the Master Agreement and the Authority's loan agreements disallow the repeal or amendment of the Act.

From the legislative and administrative point of view the most important provisions of the Master Agreement are those relating to the special tax regime created for Valco for the durations of the Agreement. The taxes to be levied against the company for the period of the regime and the manner in which they are to be levied are specified in great particularity. They include income tax, customs duties, stamp duties and road taxes. As regards customs duties, however, material and equipment needed for the construction of the smelter and in any mines to be operated by Valco are to be imported free of duty and restrictions. Similarly the importation of alumina for the smelter and the exportation of aluminium ingot manufactured at the smelter. The company is specifically exempted from payment of minerals duties in connection with the mining or processing of bauxite. It is also permitted, contrary to present statutory limits, to acquire bauxite concessions to an aggregate total of forty square miles.

In the case of income tax, the rate is fixed for the duration of the Agreement at the rate prevailing at a date one year prior to the signing of the Agreement, and in order to prevent any increase in this rate by altering the basis and manner of assessment the whole income tax ligislation as in force at that date is

annexed as a schedule to the agreement. The company is also brought within the reliefs available to a pioneer company under the general pioneer industries legislation. A complicated surgical operation was carried out here to accomodate the special terms of the Master Agreement in this regard, and also the special features of the tax regime which were put in this legislation for want of a better place.

Under the previous pioneer industries legislation, companies starting industries declared to be pioneer industries by the Government were granted relief from income tax on an amount specified in a special certificate issued to the company. This relief was available to companies resident in Ghana only, and since under Ghana law Valco would not be so resident, the first change made was to make incorporation in Ghana the test for eligibility for pioneer relief.

Formerly companies were accorded relief on the whole of their income for five years or such lesser relief as the Minister might specify. Earlier on in the negotiations Valco asked for a more definite relief, and an amendment was made to enable a pioneer company to obtain relief equal to its paid up capital at a named date which in Valco's case would be the date the smelter would start operating. This request was based on the assumption that the whole of the shareholders' investment in the company would be in the form of capital subscriptions; but later on when for fiscal reason it was arranged that a proportion only should be subscriptions to capital and the rest should be in the form of prepayments of the charges payable for converting their alumina the legislative formula for granting the relief was altered to take into account these prepayments. The final formula arrived at ain a second amending Act was for relief of such amount as the Minister may specify. This sounds like a legal merry-go-round, but the final formula is different from the first in one vital respect: a minimum holiday period of 5 years is now established in place of the period formerly available, which could be less than five years.

The tax holiday period previously commenced with the later of the start of the company's business and its "production" date as

stated in the application for relief. In the case of Valco however it was agreed that the period would not start until all the potlines of the smelter have been fully commissioned which will be eighteen months from the start of operations. It became necessary therefore to amend the law to enable the Minister to determine a third date for the start of the holiday period.

In assessing liability to income tax under the general law, the losses of a business are carried forward and offset against income at the first opportunity in subsequent years. Such losses are usually larger in the initial years of a business, and substantially reduced the relief granted during the tax holiday period. Valco required the maximum benefit from the holiday period which will be possible only if its losses during the eighteen months pre-holiday operations are not carried forward into the holiday period. Accordingly the law was further altered to enable any such losses to be frozen at the commencement of the holiday period and carried over to be offset against its post-holiday earnings. Before too, a company did not earn any capital allowances during its holiday period. During that period, however, its assets were depreciated at a rather high rate on a reducing balance basis, so that capital allowances earned on the depreciated assets in the post-holiday period were small. Valco asked for two changes here. First the company requested a reduction in the rate of depreciation during the tax holiday period, secondly they asked for this depreciation to be on a straight-line basis. The net effect of these changes is that at the end of the holiday period the value of the company's assets will be substantially greater than would be under the old law, and the capital allowances applicable to it will be correspondingly higher.

The amount of relief is expressed in terms of a foreign currency, i.e. dollars. The reason is that under their agreements for investing in Valco, the shareholders agreed to make payments in dollars, and naturally they want to earn relief on the actual value of their investment which would not be the case if the relief was on the Ghana currency equivalent of the investment and a change

occurred in the value of that currency before the full relief had been earned. It was therefore necessary to amend the law to empower the Minister to grant the relief in this manner.

None of the modifications made in the pioneer relief legislation will be automatically applicable to other companies. It would have been though impossible to make these numerous modifications without providing some windfalls for companies not contemplated by the agreements, but in all cases great care was taken to provide only such additional alternatives as were required to accomplish the special concessions granted to Valco, and to make the application of these alternatives discretionary so that the Minister can decline to apply them to other companies.

Under a provision in the first amendment of the pioneer relief law, the rate of income tax applicable to Valco during the stabilised tax regime was to be the rate generally applicable to companies at the date of issue of its pioneer certificate. It was anticipated at the time of that amendment that the rate of tax would remain the same when the certificate would be eventually issued as it was at the date at which the rate had been fixed for Valco. Before the certificate could be issed, however, certain changes had occurred in the general income tax law of Ghana which made it doubtful whether the rate of tax for companies remained the same after as before these changes, and in order to avoid any such doubt a further amendment was made to enable the Minister to apply the rate prevailing at any date in his discretion, the understanding being that the rate fixed would be that previously agreed.

The Master Agreement contain elaborate provisions dealing with exchange control, all of which have been embodied in a special set of Regulation under the relevant legislation and in letter issued to Valco by the Exchange Control Authority. To begin with the Government agrees to allow Valco to hold in an account outside Ghana receipts of foreign currency for the purpose of making certain specified payments including expenses in connection with the construction of the smelter any payments to its lenders and other vital creditor. Subject to this,

all Valco's receipts come fully under Ghana's exchange control jurisdiction, thought an assurance is given for the grant of exchange permits for other justificable purposes. Such consents are to be subject however to the general availability of foreign exchange in Ghana, and also to the retention of sufficient funds to meet the company's obligations in Ghana, particularly charges made by the Volta River Authority for the supply of power to the smelter. Applications for such consents are to be dealt on the most favourable standard. There is also an undertaking in general terms to grant exchange control consents to enable Valco to perform its obligations under the several agreements pertaining to the financing and operation of the smelter.

Under the contracts for the conversion of the shareholders' alumina, Valco may in certain circumstances extend credits to these shareholders for the tolling charge. For the purposes of exchange control, the Government agrees that such credits shall be used to offset the company's liabilities to the shareholders provided that sufficient funds are available for payments to other creditors of the company.

For the purposes of its operations in Ghana Valco requested an immigration quota under the immigration law for a number of overseas personnel, and this was established in a letter delivered by the Ministry of the Interior.

The Agreement contains other important assurances to Valco by the Government. First the Government assures Valco, its shareholders, its creditors and its employees against discriminatory laws and practices. There is a most important assurance against derogation from both those contracts scheduled to the Master Agreement by which among other things the Government grants Valco rights to land and in the port of Tema as well as for the supply of water for the smelter, and also those other agreements relating to the management and operation of the company. Any act of derogation is considered expropriation against which, as against conventional expropriation, elaborate sanctions are provided.

With regard to expropriation the Government undertakes for the period of thirty years not to expropriate or nationalize under any circumstances any right of Valco, or any share or security in the company held by any person. After that period any act of nationalization is to be accompanied by the prompt payment of fair and reasonable compensation in the original currency of the outlay. The terms used for this purpose include "intervention" which is defined as the assumption of power of management over any property of or interest in Valco which prevents the directors or officers of the company from exercising effective control over that property, or in the case of an interest in Valco, over the company; and also includes as regards shares or any security in the company, similar acts which prevent a share or debenture holder from exercising effective control over it. The only exceptions are acts in virtue of a court judgement or of a creditor. In the event of any act of nationalization, expropriation or intervention affecting a substantial portion of the rights of or in Valco, any of the shareholders can require the immediate nationalization of all the shares of Valco. Also if any such act materially affects the ability of Valco to meet any liability under any loan agreement in force between itself and any lender, all of Valco's liabilities under that agreement are automatically transferred to the Government. The rights vested in Valco by these provisions are extended to an are exercisable by Valco's shareholders. There is however, a provision for the company to give notice to the Government of any act which it considers to be expropriation, nationalization or intervention, and the Government is given two months within which to put the matter right. This clearly is designed to prevent inadvertent breaches of these important provisions which could entail quite serious consequences. Other more usual provisions relating to expropriation and nationalization are also included.

The provision relating to notification by Valco of acts of expropriation underlines the anxiety of all partners in the project not to see it founder on a mere technicality or inadvertence. This anxiety is further expressed in another legislation passed by the Parliament of Ghana stating that outside the Constitution, no existing

provision of the laws of Ghana shall make any of the agreements void or illegal. Taken together with the obligation of the Government in the Master Agreement to secure exemption from, or the repeal of any, any enactment that would interfere with or prevent the carrying into effect of these agreements, this provision renders the agreements governing the project virtually inviolable as far as the law of Ghana is concerned. The first occasion for testing the Government's undertaking to secure exemptions occured barely two months after the agreements were signed when a bill transferring all ports in Ghana from the Government to a new Ports Authority came before Parliament. The area in the Port of Tema which had been leased to Valco was exempted from the bill at the Government's request in order to retain the responsibilities it had assumed as lessor.

In addition to guaranteeing the Authority's loans, the Government agreed to guarantee the loans made to Valco in the event of nationalization or other acts of the Government which would avoid or prevent the due performance by Valco of the Master Agreement the funds arranged for the smelter if the cost exceeded those funds, which include a generous provision for contingencies. Under the Ghana Constitution it was not entirely clear whether the Government had power to provide such guarantees and a special power had been inserted in the Volta River Development Act to enable the Government to offer the guarantee on behalf of the Authority. A similar power became necessary in respect of the guarantee of Valco's loan. These powers together with the provision immunizing the agreements from the law of Ghana were put in an omnibus Act which was passed just before the signing of the Master Agreement. The same Act contains a clause which excludes the agreements, which are governed by the law of Ghana, from the operation of the new Contracts Act of Ghana. This latter Act contains provision under which third parties could benefit from certain provisions of the agreements which were intended to be exclusive to the parties.

All the loans made for the project required exemption from Ghana income tax which normally would not call for special legislative action since all the lending institutions are governmental bodies. But as the loan agreements provided for the transfer of bonds issued

in support of them to private persons, a change in the law was required to exempt the bonds from tax so long as they are in the hands of private persons not resident in Ghana. Three of the lenders to the Authority also required payment by the Authority of all stamp duties in connection with the loans, and it was considered desirable to exempt the Authority from payment of this duty altogether.

As a result of the stabilised tax regime accorded to Valco and also of the provisions of the loan agreements, a number of exemptive orders became immediately necessary. These included a resolution by Parliament under the Customs Law, and Orders under the Minerals Duty Ordinance, the Purchase Tax Act, the Property Tax Act and the Compulsory Saving Act, as well as under the Income Tax Ordinance.

In a sense these orders provide indirect subsidies by which the smelter enterprise has been attracted to Ghana. But there are other more direct subsidies. The rate charged for the supply of water for the smelter is substanially less than that charged for supplies to other customers. The port lease was also granted on very favourable terms. In the same way the rent fixed for the lease of the smelter site is about one-fifth of that usually charged for comparable land. In addition the Government has accepted a ceiling on the rates chargeable on these properties by the authorities and agreed to pay any excess levy above this ceiling.

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